DATE: January 21, 1998

CASE NO: 95-INA-384

In the Matter of:

COSMOS CONCRETE
Employer,

on behalf of

CARLOS TEIXEIRA,
Alien.

Appearances: Joseph J. Parlapiano, Esq.
for Employer and Alien

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Cosmos Concrete's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 29, 1993, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the New Jersey Department of Labor ("NJDOL") on behalf of the Alien, Carlos Teixeira. (AF 9-12). The job opportunity was listed as "Mason". The job duties were described as follows:

> SETS STONE TO BUILD STRUCTURES. SHAPES STONE PREPARATORY TO SETTING, USING CHISEL, HAMMER AND OTHER SHAPING TOOLS. ALIGNES [sic] STONE WITH PLUMB. FINISHES JOINTS WITH POINTING TROWEL. MAY LAY STONE. (AF 12).

The stated job requirement for the position, as set forth on the application, included three and one-half years of experience in the job offered. (Id.).

NJDOL transmitted resumes of two applicants to the Employer. (AF 29). The Employer indicated that none of the U.S. applicants was hired. (AF 24). The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on September 28, 1994, proposing to deny the certification for the following reasons: 1) the Employer has failed to establish that U.S. applicants were rejected solely for lawful job-related reasons. The CO found that the Employer failed to timely contact two qualified U.S. applicants; 2) The Employer has failed to submit a notice of job posting that complies with Section 656.20(g)(3); and 3) The Employer must amend the ETA-750A form if the alien will work at locations outside of the Employer's business. (AF 30-33).

The Employer submitted its rebuttal on November 3, 1994. (AF 34-36). It consisted of a cover letter from the Employer's attorney, and a statement from the Employer.

The CO issued a Final Determination ("FD") on November 4, 1994, denying certification because the Employer failed to submit a notice of job posting that complies with Section 656.20(g)(3). In addition the Employer failed to address the CO's concerns regarding the actual location where the alien would work. (AF 39-41).

On November 14, 1994, the Employer filed a Request for Reconsideration. (AF 42-74). The CO denied the Request for Reconsideration on December 6, 1994. (AF 75). On December 9, 1994 the Employer filed a timely Request for Review. (AF 76-114).

Discussion

Section 656.20(g)(1)(ii) requires the Employer to document that a notice of the filing of the application for alien employment certification has been posted at the Employer's place of business for at least 10 consecutive days. Section 656.20(g)(3) requires that the notice shall:

(i) State that applicants should report to the employer, not the local Employment Service office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

In the NOF, the CO found that the Employer failed to submit a notice of job posting that complied with Section 656.20(g)(3). The CO found that the notice of posting dated May 28, 1993, was defective. It did not include any of the language required by Section 656.20(g)(3). The CO instructed the Employer to re-post the notice and provide a copy to the CO.

In its rebuttal, the Employer stated that "I am enclosing a certification of posting containing all of the documentation required." (AF 35). In the FD, the CO found that the Employer never attached a copy of the notice of posting with its rebuttal. The cover letter from the Employer's attorney did not list the notice of posting. (AF 36).

We agree with the CO that the Employer failed to submit a notice of posting in compliance with Sections 656.20(g)(1)(ii) and 656.20(g)(3). The Employer bears the burden of documenting that it posted the job notice in compliance with the regulations. If the CO requests in the NOF documentation of the posting, the employer's rebuttal must include it. The Bowery Savings Bank, 89-INA-86 (Jan 18, 1990). Here, the Employer failed to submit the notice with its rebuttal.

The Employer, in its Request for Reconsideration and Request for Review, argues that it previously submitted a proper job notice dated August 31, 1993 on September 1, 1993, and a proper job notice dated October 23, 1994 on November 1, 1994. This argument is not persuasive. The only job notice that NJDOL received was the defective notice dated May 28, 1993. And, the CO never received any notice with the Employer's rebuttal. There is no evidence in the record to support the Employer's claims. Only now does the Employer offer copies of the two notices. The submission of the notices after the period for rebuttal is not timely and will not be considered. Barber Farm &

Robert Arthur Shuttleworth, 94-INA-559 (July 28, 1995); Anjunman Arts Academy, 94-INA-303 (May 30, 1995); Wilton Stationers, Inc., 94-INA-232 (Apr. 20, 1995).

Since we agree with the CO's conclusion that the Employer failed to timely submit the required notice, it is not necessary to address the issue of whether the Employer properly specified the location of the job site.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California